

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAN BUILDERS INSURANCE	§	
COMPANY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 4:20-cv-01859
	§	
MIDANI HOMES, LLC, BRIAN	§	
SHANKLIN, and SONDRAS SHANKLIN,	§	
	§	
Defendants.	§	

PLAINTIFF AMERICAN BUILDERS INSURANCE COMPANY'S
COMPLAINT FOR DECLARATORY JUDGMENT

TO THE HONORABLE U.S. DISTRICT COURT:

Plaintiff, American Builders Insurance Company, files this complaint for declaratory judgment and respectfully shows the Court the following:

I. PARTIES

1. American Builders Insurance Company ("Builders"), formerly known as Association Insurance Company, is a Delaware corporation with its principal place of business in Atlanta, Georgia. For diversity jurisdiction purposes, Builders is a citizen of Delaware and Georgia but not Texas.

2. Midani Homes, LLC is a Texas limited liability company whose managers are Ziad Midani, Tarek Midani, and Mona Midani. On information and belief, Ziad Midani, Tarek Midani, and Mona Midani each reside in Harris County and are Texas citizens. Midani Homes may be served with process through its registered agent, Mark D. Midani, at 5433 Westheimer Road, Suite 620, Houston,

Texas 77056 or wherever he may be found. For diversity jurisdiction purposes, Midani Homes, through its managers, is a citizen of Texas but not Delaware or Georgia.

3. Brian Shanklin is an individual and potential judgment-creditor who resides in Houston, Texas, and a Texas citizen. Shanklin may be served with process at 592 Shadow Way Court, Houston, Texas 77024 or wherever he may be found. For diversity jurisdiction purposes, Shanklin is a citizen of Texas but not Delaware or Georgia.

4. Sondra Shanklin is an individual and potential judgment-creditor who resides in Houston, Texas, and a Texas citizen. Shanklin may be served with process at 592 Shadow Way Court, Houston, Texas 77024 or wherever she may be found. For diversity jurisdiction purposes, Shanklin is a citizen of Texas but not Delaware or Georgia.

II. JURISDICTION & VENUE

5. None of the defendants in this lawsuit are Delaware or Georgia citizens like Builders, rendering Builders' citizenship completely diverse from Midani Homes' and the Shanklins' citizenship. Additionally, the amount in controversy exceeds \$75,000, exclusive of interest and costs, because the Shanklins seek at least \$798,966.51 in the Underlying Arbitration for damages arising out of Midani Homes' remodel of their house. Hence, the Court has subject-matter jurisdiction over this lawsuit under 28 U.S.C. § 1332(a)(1).

6. The Court has personal jurisdiction over Midani Homes, through its managers, and the Shanklins, individually, because they are Texas citizens.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) because Midani Homes, through its managers, and the Shanklins reside in Texas and counties in this District and Division. Alternatively, venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the Underlying Arbitration occurred in Harris County, Texas.

III. FACTS

8. Builders brings this action for declaratory judgment under both Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201, 2202. This action arises out of an underlying arbitration styled Brian Shanklin and Sondra Shanklin v. Midani Homes, LLC, AAA File No. 01-18-00002-9803 before the Arbitration Panel in Harris County, Texas (“Underlying Arbitration”).

A. Insurance

9. Builders issued 3 commercial general liability policies to Midani Homes spanning August 1, 2015, to August 1, 2018: PKG 0153927-02; PKG 0153927-03; and PKG 0153927-04 (“Policies”). The Policies have limits of insurance of \$1,000,000 per occurrence, subject to a \$1,000 deductible.

B. Underlying Arbitration

10. The Shanklins initiated the Underlying Arbitration on August 6, 2018, to recover for alleged construction defects and damages.

11. The Shanklins allegedly contracted Midani Homes on February 10, 2015, to remodel their multimillion-dollar house. Before Midani completed the remodel, the Shanklins allegedly terminated the contract on October 3, 2016.

12. Midani Homes allegedly mismanaged the remodel project, and the Shanklins' house now allegedly exhibits numerous construction defects related to Midani Homes' or its subcontractors' work, including paint and coating defects, defects in materials, and improper installation.

13. The Shanklins allege that significant defects, deficiencies, and faulty workmanship exist with respect to "(1) Exterior and Interior Paint; (2) Framing; (3) Cabinetry, Carpentry, and Sheetrock; (4) Flashing; (5) Mason, Siding, and Exterior Trim; (6) Electrical and Mechanical; (7) Fireplace; and (8) Project Management and Financial."

14. More specifically, although not exhaustively, the Shanklins' house allegedly exhibits incomplete, inadequate, and inconsistent exterior paint; out-of-square or twisted framing in several areas; improperly sized doors and door pans; inconsistent floors and subfloors; out-of-square and improperly installed cabinetry; incomplete sheetrock; unattractive, poorly cut, and improperly installed flashing; mismatched and improperly installed masonry and siding; and incomplete, exposed, and improperly installed electrical and mechanical systems.

15. The Shanklins reportedly spent \$431,945.23 to finish and correct some of Midani Homes' work, including but not limited to paint, electric, masonry, HVAC, wood flooring, tile, countertops, and sheetrock.

16. The Shanklins also claim that the repair costs for the unremedied construction defects, including framing, total \$367,021.28.

17. Seeking monetary relief of at least \$798,966.51, the Shanklins assert causes of action for breach of contract, negligence, breach of implied warranty of good and workmanlike construction, and deceptive trade practices.

IV. DECLARATORY JUDGMENT

18. Paragraphs 1-17 are incorporated herein by reference.

19. The Policies' insuring agreements grant coverage for "property damage" caused by an "occurrence" during the applicable policy term, subject to certain exclusions and endorsements. The Shanklins' claim for deceptive trade practices is not covered because it does not concern "property damage" or an "occurrence."

20. Builders seeks a declaration that it has no duty to defend or indemnify Midani Homes or the Shanklins in the Underlying Arbitration because the Shanklins' alleged construction defects and damages trigger one or more of the following policy exclusions or endorsements:

Residential Faulty Work

21. The Residential Faulty Work Exclusion¹ bars coverage for repairing, removing, replacing, or remedying Midani Homes' faulty or defective work:

TEXAS FAULTY WORK EXCLUSION WITH RESULTING DAMAGE COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

¹ The -02 Policy uses form GL RFWE 02 14, which is nearly identical to form GL RFWETX 01 15 reproduced here.

In regard only to “your work” in connection with residential structures, Exclusion I. Damage to Your Work of Section I – Coverages, Coverage A. Bodily Injury and Property Damage Liability, 2. Exclusions is deleted and replaced with:

I. Faulty, Defective or Poor Workmanship in Your Work

This insurance does not apply to any claim or “suit” for the cost of repair, replacement, adjustment, removal, loss of use, inspection, disposal, or otherwise making good any faulty, defective or poor workmanship in “your work” for which any insured or any insured’s employees, contractors, or subcontractors may be liable.

This exclusion does not apply to “property damage” sustained by any other property that is caused by the faulty, defective or poor workmanship in “your work”.

This exclusion applies only to residential structures for which coverage is not otherwise excluded under this insurance.

GL RFWETX 01 15

Coverage-Form Exclusions

22. Many coverage-form exclusions bar coverage for certain “property damage” arising out of Midani Homes’ defective work:

This insurance does not apply to:

j. Damage To Property

“Property damage” to:

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.”

...

Paragraph ... (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) ... does not apply to “property damage” in the “products-completed operations hazard”.

k. Damage To Your Product

“Property damage” to “your product” arising out of it or any part of it.

...

m. Damage To Impaired Property Or Property Not Physically Injured

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “Impaired property”;

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

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Fungi, Bacteria, and Mold

23. The Fungi and Bacteria Exclusions limit coverage for “property damage” resulting from and costs to remedy mold:

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Fungi or Bacteria

- a. “Bodily injury” or “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, of in any way responding to, or assessing the effects of, “fungi” or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

...

- C. The following definition is added to the Definitions Section:

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

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LIMITED FUNGI OR BACTERIA COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Fungi and Bacteria Each Occurrence Limit and Aggregate Limit	Fungi and Bacteria Per Occurrence Deductible for this Coverage Part
\$2,500	\$2,000

The insurance provided under Section I – Coverage A – Bodily Injury and Property Damage Liability as modified by the Fungi Or Bacteria Exclusion is hereby extended to provide insurance for (a) “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any fungi or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage; and (b) any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of fungi or bacteria, by any insured or by any other person or entity.

- A. For any purposes of this Limited Fungi or Bacteria Liability insurance only, Paragraph 1.a., 1.b., 1.c., 1.d., and 1.e. of Section I – Supplementary Payments – Coverages A and B, are deleted: DEFENSE EXPENSES AND OTHER COSTS PROVIDED UNDER THE DELETED PARAGRAPHS ARE INCLUDED WITHIN THE LIMITED OF LIABILITY SHOWN IN THE SCHEDULE ABOVE.
- B. For purposes of this Limited Fungi or Bacteria Liability insurance only, Section III – Limits of Insurance is deleted and replaced by the following:

1. The Limits of Insurance shown in the Limited Fungi or Bacteria Liability Schedule above and the provisions below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or “suits” brought”; or
 - c. Persons or organizations making claims or bringing “suits”.
2. The Aggregate Limit shown in the Limited Fungi or Bacteria Liability Schedule above is the most we will pay for the sum of:
 - a. Damages under Coverage A. for “property damage” insured under this endorsement; and
 - b. Any amounts that, but for Paragraph A., would have been payable under Paragraph 1.a., 1.c., 1.d., and 1.e. of Section I – Supplementary Payments – Coverages A. and B.
3. The Products-Completed Operations Aggregate Limit for “property damage” insured under this extension of Coverage A. for Limited Fungi or Bacteria Liability is the same as and included within the Aggregate Limit shown in the Schedule above, and subject to the terms of this endorsement, is the most we will pay for such “property damage”.
4. Subject to 2. and 3. Above, whichever applies, the Each Occurrence Limit shown in the Schedule above is the most we will pay for the sum of:
 - a. Damages under Coverage A.;
 - b. Any amounts that but for Paragraph A. above, would have been payable under Paragraph 1.a., 1.c., 1.d., and 1.e. of Section I – Supplementary Payments – Coverages A. and B.

because of “property damage” insured under this extension of Coverage A. for Limited Fungi or Bacteria Liability arising out of any one “occurrence”.

5. Subject to 4. above, the Damage To Premises Rented To You Limit for “property damage” insured under this extension of Coverage A. for Limited Fungi or Bacteria Liability is the same as the Aggregate Limit shown in the Schedule above and, subject to the terms of this endorsements, is the most we will pay for such “property damage”.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after the issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the limits of insurance.

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Construction Management Errors and Omissions

24. The Construction Management Errors and Omissions Exclusion bars coverage for certain “property damage” arising out of Midani Homes’ inspection or supervision activities:

EXCLUSION – CONSTRUCTION MANAGEMENT ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability ...:

This insurance does not apply to ... “property damage” ... arising out of:

1. The preparing, approving, or failure to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications by any architect, engineer or surveyor performing services on a project on which you serve as construction manager; or
2. Inspection, supervision, quality control, architectural or engineering activities done by or for you on a project on which you serve as construction manager.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the ... “property damage” ... involved that which is described in Paragraph 1. or 2.

This exclusion does not apply to ... “property damage” due to construction or demolition work done by you, your “employees” or your subcontractors.

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Designated Professional Services

25. The Designated Professional Services Exclusion bars coverage for certain “property damage” arising out of Midani Homes’ rendering or failing to render professional services:

EXCLUSION – DESIGNATED PROFESSIONAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description Of Professional Services
1. Real Estate Agents and/or Brokers
2. Architects, Engineers or Surveyors
3.
Information required to complete this Schedule, if not shown, above, will be shown in the Declarations.

With respect to any professional services shown in the Schedule, the following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability ...:

This insurance does not apply to ... “property damage” due to the rendering of or failure to render any professional service.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the ... “property damage” involved the rendering of or failure to render any professional service.

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Contractor’s Professional Liability

26. The Contractors – Professional Liability Exclusion bars coverage for certain “property damage” arising out of Midani Homes’ rendering or failing to render professional services in connection with certain operations relating to engineering, architectural, or surveying services:

EXCLUSION – CONTRACTORS – PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability ...:

1. This insurance does not apply to ... “property damage” arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
 - a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
 - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the ... “property damage” involved the rendering of or failure to render any professional services by you or on your behalf with respect to the operations described above.

2. Subject to Paragraph 3. below, professional services include:
 - a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
 - b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.
3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

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27. Because the Shanklins’ allegations trigger one or more of the foregoing exclusions or endorsements, there is no coverage under the Policies for any alleged “property damage,” and Builders does not owe a defense or indemnity to Midani Homes or the Shanklins.

V. CONCLUSION & PRAYER

28. Paragraphs 1-27 are incorporated herein by reference.

29. Midani Homes allegedly performed its remodel work defectively, so the Shanklins filed the Underlying Arbitration against Midani Homes. The Shanklins seek monetary relief for alleged construction defects and damages that are excluded under the Policies.

30. Alternatively, Builders asserts that Midani Homes and/or the Shanklins bear the duty of segregating covered and noncovered damages under the Policies. No such segregation between covered and noncovered damages has occurred, and

Builders has no duty to pay until Midani Homes and/or the Shanklins satisfy their burden to so segregate damages.

31. Because one or more exclusions or endorsements bar coverage for any “property damage” alleged by the Shanklins, Builders asks the Court for:

- a. A declaration that Builders does not have a duty to defend or indemnify Midani Homes or the Shanklins for any such “property damage;
- b. Alternatively, a declaration that Midani Homes and/or the Shanklins must segregate between covered and noncovered damages before Builders has any duty to pay;
- c. Court costs; and
- d. All other relief that the Court deems appropriate.

Respectfully submitted,

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